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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

LOWELL LABERTEW, an individual; and SANDRA LABERTEW, an individual, Plaintiffs, vs. 3BC CORPORATION, a California Corporation; C&R FINANCIAL INC., an entity of unknown form; RAYMOND JACOB ROSZKOWICZ, an individual; RICK WILKES, an individual; BEVERLEE WILKES, an individual; and DOES 1-10, inclusive, Defendants.	CASE NO. 07CV2092W (LSP) **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

PLAINTIFFS, LOWELL and SANDRA LABERTEW ("Plaintiffs") submit this points and authorities in support of their Application For Temporary Restraining Order ("TRO") and Preliminary Injunction.

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I. FACTUAL BACKGROUND

In about October 2006, and shortly after Plaintiffs emerged from Chapter 13 bankruptcy, Plaintiffs were solicited for a second time by defendants C&R Financial Inc. ("C&R") and Raymond Jacob Roszkowicz ("RJR"), who offered to assist Plaintiffs in obtaining a loan secured by a second deed of trust against their primary residence. Defendant RJR is and was a California licensed real estate sales person originating consumer loans pursuant to Cal. Fin. Code §4970(h). According to the California Department of Real Estate, RJR has his license with 3BC Corporation ("3BC"), which is a California licensed real estate broker.

On October 30, 2006, Plaintiffs signed several documents presented to them by defendants C&R through RJR, including an Uniform Residential Loan Application, a Good Faith Estimate, a Truth-In-Lending Disclosure Statement, a Borrowers' Certification and Authorization, a Borrower Signature Authorization, and a Opting Out form. *See*, Exhibit "A" to Complaint.

On November 9, 2006, Plaintiffs entered into a consumer credit transaction ("Transaction") to refinance their principle dwelling/residence located at 4515 Diane Way, San Diego, California 92117 (the "Property"), by signing Transaction document for a consumer loan with defendants Rick and Beverlee Wilkes ("Wilkes"), in the amount of Forty Five Thousand Fifteen Dollars and Ninety One Cents ($45,015.91), secured by a second deed of trust on Plaintiffs' residence. The purpose of the Transaction was primarily personal, family, or household in that it was used to bring Plaintiffs' first mortgage current, and pay off an existing vehicle loan. The Transaction was consummated through a mortgage broker in that defendants 3BC, RJR and C&R were handling the Transaction as a mortgage broker.

The Transaction was a high rate mortgage within the meaning of the Home Ownership and Equity Protect Act ("HOEPA"), 15 U.S.C. §§1602(aa)(1)(A) and (B) in that the loan provided for (1) an annual percentage of 18.776%, which exceeded more than 10 percentage points the yield on Treasury securities having comparable periods of maturity on the fifteenth day of the month immediately preceding the month in which the application for the extension of credit was received (on September 15, 2006 the 6 month yield on Treasury securities was 5.11%), and (2) the total points and fees payable by the consumer at or before closing was in excess of Forty Three Hundred Dollars ($4,300.00), which exceeded the greater of 8% of the total loan amount, or Four Hundred Dollars ($400.00). The Transaction was subject to a finance charge and was payable by written agreement in more than four installments. Furthermore, the loan was a "covered loan" within the meaning of Cal. Fin. Code §4970(b) and the loan was a "consumer loan" within the meaning of Cal. Fin. Code §4970(d).

In addition, the Transaction was subject to a balloon payment in the amount of Forty Four Thousand Seventy One Dollars and Ninety Seven Cents ($44,071.97) upon the sixth monthly payment. When Plaintiffs told defendant RJR that they could not come up with that much money in six months, RJR represented that if Plaintiffs went through with the Transaction C&R and RJR would assist them in improving their derogatory credit history and obtaining a refinance of the balloon payment when it came due in six months. Plaintiffs relied on these representations, which were false, and went through with the Transaction to their detriment.

On November 9, 2006, in the course of the Transaction, Plaintiffs did not receive Transaction documents required by the Truth In Lending Act "TILA", including but not limited to two copies each of the Notice of Right to Cancel containing the date the cancellation period expires. In addition, specific disclosures required by HOEPA, 15 U.S.C. §1639(a) were not provided to Plaintiffs in a timely manner as required by 15 U.S.C. §1639(b) and specific disclosures required by Cal. Fin. Code §4973(k) were not provided to Plaintiffs in a timely manner as required by Cal. Fin.

Code §4973(k).

The only Transaction documents received by Plaintiffs on November 9, 2006 were 1) a Good Faith Estimate (*See*, Exhibit "Comp. B-1" to Complaint), 2) a Deed of Trust with Assignment of Rents (*See*, Exhibit "Comp. B-2" to Complaint), an Installment Note (Interest Only) (*See*, Exhibit "Comp. B-3" to Complaint), and an Addendum To Note Dated November 8, 2006 (*See*, Exhibit "Comp. B-4" to Complaint).

Pursuant to TILA, 15 U.S.C. §1635 and Reg. Z, 226.15, failure to provide material disclosures extended Plaintiffs' right of rescission to three years.

On August 18, 2007, pursuant to 15 U.S.C. §1635, Plaintiffs rescinded the Transaction by sending the notice (Rescission Notice) as required by Regulation Z to defendants Wilkes, the current owners of the note. *See*, Exhibit "Comp. C" to Complaint.

On October 25, 2007, over two months after making demand thereof, Plaintiffs received from defendants Wilkes a copy of a Notice of Right of Rescission and Truth-In-Lending Disclosure Statement dated 11/08/2006, that Plaintiffs signed, but did not receive. The Notice of Right To Cancel provided to Plaintiffs on or about October 25, 2007 confirms that Plaintiffs were not given four copies of the Notice of Right of Rescission as required by TILA. *See*, Exhibits "Comp. D-1" and "Comp. D-2" to Complaint.

Unlike common law rescission, TILA requires that upon Plaintiffs' exercise of their right to rescind, and before Plaintiffs are required to tender, within 20 days after receipt of a notice of rescission, defendants Wilkes shall return to the Plaintiffs any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the Transaction.

More than twenty (20) days have elapsed since Plaintiffs' Rescission Notice was received by defendants Wilkes, and defendants Wilkes have failed and refused, and continue to fail and refuse, to perform any of the acts required by 15 U.S.C. §1635(b), and have instead continued their foreclosure proceedings and scheduled a sale of the Real Property for November 14, 2007. *Raymond Dec.,* Exhibit "Comp.-E".

Even though defendants Wilkes were aware of the rescission, contrary to complying the requirements of TILA, defendants Wilkes have willfully and intentionally proceeded to immediately foreclose upon Plaintiffs' residence by **scheduling a trustee's sale for November 14, 2007**. Only the issuance of an injunction will prevent the imminent foreclosure sale of Plaintiffs' home and give Plaintiffs the opportunity to be heard on the merits.

II. ARGUMENT

The purpose of a TRO is to preserve the status quo pending a full hearing on a preliminary injunction. *Bronco Wine Company v. United States Department of Treasury*, 997 F. Supp. 1309, 1313 (E.D. Cal. 1996). A party seeking a TRO must satisfy the same test required for the issuance of a preliminary injunction. *Id.* A party seeking preliminary injunctive relief under Federal Rule of Civil Procedure 65 must show (1) a likelihood of success on the merits, (2) a significant threat of irreparable harm, (3) that the balance of hardships favor the applicant, and (4) whether any public interest favors granting an injunction. *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003)(citing *Dollar Rent A Car of Wash. Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985)) *vacated and remanded on other grounds* by *Gonzalez v. Raich* 545 U.S. 1 (2005).

A. THE MERITS OF PLAINTIFF'S CLAIMS

The loan Transaction has numerous predatory terms, including without limitation, A) an 18.776 Annual Percentage Rate, B) fees and points of over $4,300.00 in excess of 8% of the loan amount, and C) a balloon payment of $44,071.97 payable within 8 months of the loan origination date. HOEPA, TILA, Reg Z, and California Finance Code sections 4970 et seq. (collectively referred to as "Consumer Protection Laws") were enacted to protect consumers from the specific type of predatory Transaction perpetrated on Plaintiffs by Defendants. These Consumer Protection Laws require certain disclosures and prohibit certain predatory terms for consumer loans that take a secured interest in a consumer's primary residence.

A creditor's violation of TILA allows the borrower to rescind a consumer loan secured by the borrower's primary dwelling. *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 703-704 (9th Cir. 1986). Technical or minor violations of TILA or Reg Z, as well as major violations, impose liability on the creditor and entitle the borrower to rescind. *Id.* To insure that the consumer is protected ....[TILA and Reg Z must] be absolutely complied with and strictly enforced. *Id.*

A creditor's violation of HOEPA, not only allows the consumer to seek damages under 15 U.S.C. §1640(a), and special enhanced damages under § 1640(a)(4), but also gives rise to the extended right to rescind under §1635 and Reg Z 226.23(a)(3). 15 U.S.C. §1635 and Reg Z 226.23(a)(3).

a. TILA/HOEPA VIOLATIONS

Since this case involves a high cost, high interest rate loan and is cover, not only by TILA, but also by the special protections of HOEPA, certain documents, including but not limited to four completed Notices of Right of Rescission and a HOEPA section 32 Notice were required to be delivered in a timely manner to Plaintiffs, in a form that they could keep. 15 U.S.C. §§ 1635, 1639(a); Reg. Z, 226.15, 226.17, 226.32.

Although, both Plaintiffs signed certain documents at the time of consummation of the Transaction, neither Plaintiff received all of the required documents. *See*, *LLabertew Decl.*, para. 6; *SLabertew Decl*., para. 6. Although defendants Wilkes have provided two documents, a Notice of Right of Rescission containing Plaintiffs' signatures and a Truth In Lending Disclosure Statement dated 11/8/2006 (*See*, Exhibits "Comp. D-1" and "Comp. D-2" to Complaint), Plaintiffs were never given these documents in a form that they could keep. Even assuming *arguendo* that Plaintiffs did receive the two documents produced by defendants Wilkes, the two documents prove that the Transaction violated TILA and HOEPA as follows:

1. The Notice of Right of Rescission ("NRR") supports the finding of a violation of TILA in that it states that Plaintiffs received only two copies of the NRR. Reg. Z requires a creditor to deliver two copies of the NRR to EACH consumer. Reg. Z, 226.23(b)(1); Reg. Z, *Official Commentary*, 226.23(b)(1). Since there were two consumers, i.e., Lowell Labertew and Sandra Labertew, four copies were required. Assuming *arguendo* that Plaintiffs did receive two copies of the NRR, a violation still occurred because Plaintiffs were entitled to four copies of the NRR.

2. The Truth In Lending Disclosure Statement dated 11/8/2006 supports the finding of a violation of HOEPA in that it confirms an annual percentage rate of 18.776% and confirms a prohibited balloon payment on a loan with a term of less than 5 years in violation of section 1639(e). 15 U.S.C. § 1639(e); Reg. Z, 226.33(d)(1)(I).

In addition to the violations shown by the documents produced by defendants Wilkes, several other violations exist, including but not limited to the failure to provide specific disclosures required by HOEPA. 15 U.S.C. § 1639(a); Reg. Z, 226.33(c).

On August 18, 2007, Plaintiffs exercised their right of rescission and rescinded the Transaction.

b. THE EFFECT OF RESCISSION IS THAT NO VALID SECURITY INTEREST EXISTS UPON WHICH DEFENDANTS CAN MAINTAIN THEIR FORECLOSURE ACTION

TILA and Reg Z specifically describe the steps that must occur and their timing once a consumer rescinds. 15 U.S.C. §1635(b); Reg Z 226.23(d).

Step 1: Upon rescission by a consumer, the security interest (in this case **the deed of trust) is automatically void** and the consumer owes no finance or other "charges". "Other" charges include any closing costs even if they were paid to a third party. Reg Z, *Official Staff Commentary*, 226.23(d)(2)-1.

Step 2: Within 20 days of receipt of a consumer's notice of rescission, the creditor shall return to the consumer any money or property given by the consumer and shall take any action necessary or appropriate to reflect the termination of the security interest.

Step 3: Once the creditor performs its obligations, the consumer must tender the balance due to the creditor.

Step 4: If the creditor does not take possession of the property within 20 days after tender by the consumer, ownership in the property vests in the consumer.

Plaintiffs mailed their notice of rescission to defendants Wilkes on August 18, 2007. Under the statutory scheme, the deed of trust against Plaintiffs' residence is void and defendants Wilkes had 20 days from the date of rescission to release the deed of trust.

The deed of trust that defendants Wilkes have based their foreclosure action upon is void and unenforceable. **Yet, after receiving the notice of rescission, defendants Wilkes have scheduled a sale date of Plaintiffs' residence for November 14, 2007 and have failed and refused to cancel or postpone said sale pending the outcome of Plaintiffs' claims.**

B. PLAINTIFFS' WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF NOT GRANTED

a. Loss of Personal Residence Is Irreparable Harm

Defendants Wilkes are attempting to foreclose upon Plaintiffs' family home. Plaintiff Sandra Labertew has lived in Plaintiffs' home since it was built in 1965 (over 40 years) and it is the home that she raised her children in. *SLabertew Dec*., para. 8. Plaintiff Lowell Labertew has lived in Plaintiffs' home since 1977 (approx. 30 years). *LLabertew Dec*., para. 8. Plaintiffs live in their home with Plaintiff Sandra Labertew's 89 year old mother, who is suffering from diabetes and congestive heart failure, and Plaintiffs granddaughter, who is a 20 year old full time student in her junior year at San Diego State University. *SLabertew Dec*., para. 8; *LLabertew Dec*., para. 8. Over the past few years, Plaintiffs' home has been the holiday gathering place for their entire family. *SLabertew Dec*., para. 8.

If injunctive relief is not granted, Plaintiffs will suffer the following irreparable harms:

1) Their family home of several decades could be sold to a bona fide purchaser and potentially lost to them forever;

2) Plaintiffs' home is unique, and if sold, Plaintiffs will be unable purchase the exact same home anywhere else;

3) Plaintiffs' could be forced to move from their home, which would cause great stress upon Plaintiffs and other family members, including Plaintiff Sandra Labertew's 89 year old mother who is suffering from serious illness and such a move could cause her great bodily injury or even death; and

4) Plaintiffs' could be forced to move from their home, which would subject them not only to humiliation and embarrassment among their family members, but also public humiliation and loss of reputation in the community in which they have lived and worked for more than 30 years. *LLabertew Dec*., para. 11; *SLabertew Dec*., para. 11.

C. THE BALANCE OF THE HARDSHIPS FAVORS PLAINTIFFS

The irreparable harm Plaintiffs will suffer if their home is sold through foreclosure far outweighs any harm to defendants Wilkes. If the foreclosure sale is permitted to happen and Plaintiffs could have ultimately succeeded on the merits of their claims, Plaintiffs will have suffered irreparable harm. However, if Plaintiffs do not succeed on their claims, Defendants would be free to continue with their foreclosure sale of Plaintiffs' residence.

Thus, if Plaintiffs do not prevail on their claims, Defendants will have ultimately lost nothing in affording Plaintiffs the opportunity to have their claims adjudicated.

D. PUBLIC INTEREST FAVORS GRANTING INJUNCTION

The public interest will certainly be served by the issuance of injunctive relief in this case. To allow the foreclosure sale of Plaintiffs' home without first determining the validity of the underlying deed of trust undermines public interest. The documents given to Plaintiffs' at the consummation of the loan, along with Plaintiffs' notice of rescission received by Defendants raise serious doubts as to the validity of the deed of trust that is the subject of the foreclosure proceedings. To allow the foreclosure proceeding to go any further will not only be a gross injustice, but will violate all notions of public policy as well as frustrating the clearly expressed intent of Congress in providing for the rescission remedy in TILA and HOEPA.

E. NO ADDITIONAL SECURITY SHOULD BE REQUIRED FROM PLAINTIFFS

Rule 65(c) requires that in order for a restraining order or preliminary injunction to be issued, a security must be given by the applicant, in such sum as the court deems proper. FRCP 65(c) . Defendants have not removed the security interest, i.e., deed of trust from Plaintiffs' residence, and continue to maintain said interest in Plaintiffs' residence.

A according to the Multiple Listing Service ("MLS"), a home a few doors down from Plaintiffs' home sold and closed escrow on October 25, 2007 for $673,500.00. *Raymond Decl.*, Exhibit "DLR-A". Plaintiffs' home is larger than the home that sold in that it has 5 bedrooms, 4 bathrooms and is approximately 2,189 square feet with approximately one-quarter acre of land. *SLabertew Dec*., para. 12.

According to the Notice of Trustee's Sale, defendants Wilkes claim that Plaintiffs owe approximately $66,143.60. *See*, Exhibit "Comp. E" to Complaint. Defendants Wilkes are in second position behind a first deed of trust of approximate $487,500.00 for a total of $553,643.60. Based on the recent sale and the total amount alleged to be owing between the first and second deeds of trust, it would appear that there is sufficient additional security in Plaintiffs' home for any potential costs and damages defendants Wilkes may incur or suffer if they are found to have been wrongfully enjoined or restrained.

On the grounds set forth above, Plaintiffs request that the Court find that the deed of trust, which Defendants have failed and refused to remove, and continue to maintain is sufficient security to meet the requirements of FRCP 65(c) and no additional security will be required from Plaintiffs.

III. CONCLUSION

Plaintiffs respectfully submit that they have shown that a TRO, and then, a preliminary injunction should issue because while comparatively great harm may result from withholding this relief, little injury will flow from granting it. Further, Plaintiffs respectfully submit on its face, Plaintiffs' case has sufficient merit to support a finding that the status quo should be preserved until the controversy can be disposed of on the merits.

Plaintiffs request that the Court grant the TRO and then the preliminary injunction to restrain and enjoin Defendants, their agents, assigns, employees, officers, attorneys, and representatives and those in active concert or participation with Defendants or them, pending trial of this action, from engaging in or performing any act to deprive Plaintiffs of their ownership and/or possession of the real property located at 4515 Diane Way, San Diego, California 92117, including but not limited to instituting, prosecuting, or maintaining foreclosure or sale proceedings on Plaintiffs' residence, from recording any deeds or mortgages regarding Plaintiffs' residence or from otherwise taking any steps whatsoever to deprive Plaintiffs of ownership and/or possession in Plaintiffs' residence, and **in particular from proceeding with the sale of Plaintiffs' residence scheduled for November 14, 2007.**

Date: November 04, 2007

/s/ Deborah L. Raymond
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